Consumer Federation of America

Report

Missing in Action? Consumer Financial Protection Bureau Supervision and the Military Lending Act

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Executive Summary

The Consumer Financial Protection Bureau ("CFPB"), under the leadership of Acting Director Mick Mulvaney, recently announced plans to end supervisory examinations for violations of the Military Lending Act, a statute designed to protect military servicemembers and their families from predatory lending. Congress passed the Military Lending Act ("MLA") in 2006, in response to evidence that predatory loans targeted at servicemembers were undermining not only the morale and financial stability of our troops, but also the nation's military readiness in general. The MLA caps the interest on all loans made to servicemembers and their families at 36 percent per year and prohibits the extension of payday loans, vehicle title loans, and other types of harmful credit products to military personnel. Since 2012, the CFPB has conducted supervisory examinations of large banks, payday lenders, and other financial companies to ensure compliance with the MLA.

The Trump Administration, however, has recently decided to end the CFPB's supervision of MLA violations. Acting Director Mick Mulvaney has expressed the belief that the CFPB lacks the statutory authority to include MLA compliance in its supervisory work. While servicemember advocates, veteran's rights groups, members of Congress, and state attorneys general have all voiced concern over the CFPB's decision to cripple its MLA enforcement program, CFPB leadership maintains that, under federal law, the Bureau may not cover MLA compliance in its supervisory exams.

This report is the first publicly available legal analysis of the CFPB's authority to include MLA compliance within its supervisory exams. This analysis concludes that the CFPB has ample legal authority under both its enabling statute, the Consumer Financial Protection Act ("CFPA"), as well as the MLA itself to include the MLA within supervisory exams. The CFPB has this legal authority for at least four reasons. First, violations of the MLA render servicemembers' loans void, thereby triggering concurrent violations of federal consumer financial laws that the CFPB must already cover within its exams. Second, the CFPB may use its supervisory exams to obtain information about MLA compliance because such information is pertinent to business practices already subject to CFPB enforcement under the CFPA. Third, under the CFPA, the CFPB can cover MLA violations within its exams for the purpose of detecting and assessing risks to consumers. And fourth, the text of the MLA itself requires the CFPB to enforce the MLA in the same way that the CFPB enforces the Truth in Lending Act – which includes supervisory exams. This report should give the Bureau confidence that it has the discretion – indeed, the duty – to honor the sacrifices made by military servicemembers and their families by protecting them through its supervisory powers.

Report

Care for us! True, indeed! They ne'er cared for us yet: suffer us to famish, and their store-houses crammed with grain; make edicts for usury, to support usurers; repeal daily any wholesome act established against the rich, and provide more piercing statutes daily, to chain up and restrain the poor. If the wars eat us not up, they will; and there's all the love they bear us.

-William Shakespeare, *Coriolanus* (c. 1605).

Introduction

Americans of all political persuasions agree that we owe a debt of gratitude to our nation's military servicemembers. Our men and women in uniform along with their families make special sacrifices for our freedom and national security. In recognition of this sacrifice, Congress passed the Talent-Nelson amendments in the John Warner National Defense Authorization Act for Fiscal Year 2007.[1] These amendments – now commonly referred to as the Military Lending Act ("MLA") – established a national usury limit for servicemembers and their dependents. The MLA was Congress' response to evidence that high-cost lending to military service members and their dependents "undermines military readiness, harms the morale of troops and their families, and adds to the cost of fielding an all volunteer fighting force."[2] Members of Congress expressed concern that "[p]redatory lenders" were "blatantly targeting our military personnel, undermining their financial stability and tarnishing their service records."[3] Characterizing triple-digit interest rate loans to service members as "absolutely reprehensible," Congress acted to place a limit on interest rates of no more than 36 percent per annum.[4]

Congress provided for the enforcement of the Military Lending Act by empowering an array of federal financial regulators to use their existing authority and staff to stop MLA violations. Congress sensibly relied upon these financial regulators to enforce the Military Lending Act in order to allow the Department of Defense ("DOD") – the agency statutorily tasked with administering the MLA – to focus on its core mission of protecting the country.

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[1] Talent-Nelson Amendment, enacted as section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2266-2269 (2006) (codified at 10 U.S.C. § 987).

[2] U.S. DEPT. OF DEFENSE, REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 9 (2006), http://www.dtic.mil/dtic/tr/fulltext/u2/a521462.pdf.

[3] *A Review of the Department of Defense's Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents: Hearing Before the S. Comm. on Banking, Housing, and Urban Aff.,* 109th Cong., 2d Sess., S. Hrg. 109-1081, at 218-397 (Sept. 14, 2006) (Statement of Senator Elizabeth Dole).

[4] *Id.* (statement of Senator Jack Reed).

After the 2008 financial crisis, Congress reorganized the enforcement of federal consumer finance law when it established the Bureau of Consumer Financial Protection ("CFPB," "BCFP," or "the Bureau"). Congress tasked the CFPB with protecting all Americans from harmful or abusive consumer finance products. Although the MLA was not a focal point within the reforms that followed the home mortgage foreclosure crisis, Congress eventually recognized that the CFPB was particularly well-suited to enforcement of the Military Lending Act. In 2012 Congress amended the MLA to task the CFPB with MLA enforcement alongside the other financial regulators that possessed this authority from the original Act.[5] Since then, the CFPB has routinely engaged in MLA enforcement activities including supervisory examinations of large banks, payday lenders, and other financial companies to ensure compliance with the MLA.

However, in recent months, the Trump Administration has reversed direction by announcing plans to end the CFPB's supervisory examinations for MLA violations. CFPB leadership, under Acting Director Mick Mulvaney, has publicly expressed the belief that the Bureau lacks the statutory authority to conduct these routine examinations. Moreover, internal CFPB documents obtained by national press outlets reportedly reflect a Bureau decision to stop including MLA compliance within the Bureau's supervisory work. Military service member support organizations, veterans' rights groups, as well as members of Congress and state attorneys general have all voiced their concern over the Bureau's decision to weaken its MLA enforcement program.[6] But Bureau leadership has continued to maintain that, in effect, the Bureau's hands are tied because they believe that federal law does not allow the CFPB to cover MLA compliance within its routine examinations.

This report is the first publicly available legal analysis of the CFPB's authority to include MLA compliance within its supervisory exams. This analysis concludes that the CFPB has ample legal authority under both its enabling statute, the Consumer Financial Protection Act ("CFPA"), as well as the MLA itself to include MLA compliance within its exams. This report begins with a brief background discussion of the creation of the Military Lending Act and the CFPB's MLA enforcement responsibilities. Second, this report presents evidence that CFPB leadership made an about-face on military servicemember protection in supervisory examinations through an irregular and flawed process. Third, multiple subsections within the CFPA provide a strong statutory basis upon which Bureau leaders could conclude that they have the legal authority to include the MLA in supervisory exams. And fourth, along with the CFPA, the text of the 2012 amendments to the MLA itself also provides an independent and sufficient basis for Bureau leaders to include the MLA within supervisory exams. This report also includes, as an appendix, two letters that shed doubt on the Bureau's current position.

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[5] *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, 126 Stat. 1786 (assigning enforcement of 10 U.S.C. § 987 to "the agencies specified in section 108 of the Truth in Lending Act") (codified as 10 U.S.C. § 987(f)(6)). The CFPB is one of the agencies specified in the Truth in Lending Act as "enforcing agencies." 15 U.S.C. § 1607(a)(6).

[6] *See, e.g.,* Karen Jowers, *Advocates to Mattis: Don't waver in protecting troops against predatory lenders,* MIL. TIMES (Aug. 23, 2018), https://www.militarytimes.com/pay-benefits/2018/08/23/advocates-to-mattis-dont-waver-in-protecting-troops-against-predatory-lenders/; Mark Huffman, *Attorneys General call for strict enforcement of the Military Lending Act,* CONSUMER AFF. (Oct. 25, 2018), https://www.consumeraffairs.com/news/attorneys-general-call-for-strict-enforcement-of-the-military-lending-act-102518.html.

The first letter, from the Bureau's own Assistant Director for Military Servicemember Affairs, concludes that the CFPB does have the legal authority to include MLA within supervisory exams. The second letter, from the Department of Defense, shows that the Bureau has reversed its position on MLA supervision without consulting the DOD.

Background

Usury Law and Military Servicemembers

For most of American history, state usury laws prohibited lenders from charging triple-digit interest rates. All thirteen original colonies adopted usury limits of between five and twelve percent.[7] Most of these statutes predate the U.S. Constitution. In the early twentieth century states began relaxing their usury laws to allow licensed and regulated lenders to develop the consumer credit products now common in America's mainstream consumer economy.[8] By the mid-twentieth-century, state usury laws evolved into a complex patchwork of limitations on various types of credit charged by different lenders.[9] Nevertheless, through the 1960s, every state in the Union retained a usury limit effectively prohibiting triple-digit interest rate loans.[10] The most common price limit for small loans throughout the second half of the twentieth century were usury caps of 36 percent per annum.

In the 1980s and 1990s, many states relaxed their traditional interest rate limits. States made these changes in response to a variety of factors. High inflation in the late 1970s and early 1980s increased lenders' cost of funds.[11] As prevailing rates approached state usury limits it became temporarily difficult for banks and others to profitably lend at legally permissible rates. Some states abolished their interest rate limits altogether while others created new exceptions or pegged permissible rates to a fluctuating index.[12] Moreover, a controversial Supreme Court decision interpreting the National Bank Act authorized national banks to export interest rates from the bank's home state to consumers in states with higher interest rate limits.[13] This sparked a race to the bottom, with a series of reactive laws effectively preempting the application of traditional usury limits as applied to banks but not to other nondepository lenders.[14]

In the 1990s non-bank check cashing businesses lobbied state legislatures around the country to permit "deferred presentment" of consumers' personal checks. In these transactions, which have come to be known as "payday loans," a check casher agrees to hold

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[7] Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1117-118 (2008).
[8] *Id.* at 1119.
[9] *Id.* at 1121.
[10] *Id.*
[11] Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 Ohio St. L.J. 653, 672 (2005).
[12] *Id.* at 672–73.
[13] *See* Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299, 309–313 (1978).
[14] Peterson, *supra* note 7 at 1121.

a borrower's personal check for a few weeks in exchange for a fee.[15] In effect, if not originally in name, these transactions were high-cost, short-term loans. However, evidence soon mounted that the vast majority of consumers did not use payday loans on a one-time basis.[16] Rather, most consumers were unable to retire their payday loans within the first few weeks. For these borrowers, payday loans become a debt trap where they "roll over" their loan again and again. "Over 80% of payday loans are rolled over or followed by another loan within 14 days."[17] Most consumers are forced to turn to family or friends before escaping from the triple-digit interest rate loan.[18] Storefront payday lender locations exploded nationwide as more and more low- to moderate-income Americans began using a newly available credit product with average interest rates of over 400 percent per annum.

The erosion of state usury limits had a profound effect on military service members. One study of states with large military populations found overwhelming evidence that triple-digit interest rate payday lenders clustered around military bases to target enlisted personnel.[19] Following a *New York Times* expose, Congress directed the Department of Defense to study whether high-cost credit products were harming the military.[20] The Pentagon responded in 2006 with a detailed report to Congress concluding that "predatory lenders market to the military through their ubiquitous presence around military installations" with the goal of "seek[ing] out young and financially inexperienced borrowers."[21] These borrowers are "less likely to weigh the predatory loan against other opportunities and are less likely to be concerned about the consequences of taking the loan."[22] At the time of the report, "[f]orty-eight percent of enlisted Service members [were] less than 25 years old, typically without a lot of experience in managing finances, and without a cushion of savings to help them through emergencies."[23] The Pentagon concluded that high-cost credit products, such as payday loans and similar forms of credit not only hurt servicemembers by "undermin[ing] troop readiness, morale, and quality of life," but also disrupted military operations when servicemembers'

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[15] *See* Consumer Federation of America, *How Payday Loans Work*, PAYDAYLOANINFO.ORG (last accessed Aug. 27, 2018), https://paydayloaninfo.org/facts (defining payday loan as a loan secured by "the borrower's personal check held for future deposit or on electronic access to the borrower's bank account.").

[16] *See* PETER SKILLERN, CMTY. REINVESTMENT ASS'N OF N.C., SMALL LOANS, BIG BUCK$: AN ANALYSIS OF THE PAYDAY LENDING INDUSTRY IN NORTH CAROLINA 4 (2002), *available at* http://www.cra-nc.org/small%20loans%20big%20bucks.pdf (finding 85 percent of payday lender revenue comes from borrowers with over five loans per year).

[17] CONSUMER FIN. PROTECTION BUREAU, CFPB DATA POINT: PAYDAY LENDING 4 (2014) https://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf.

[18] CONSUMER FIN. PROTECTION BUREAU, *supra* note 16 (finding that half of all payday loans "are in a sequence at least 10 loans long" and that most payday borrowing "involves multiple renewals following an initial loan, rather than multiple distinct borrowing episodes separated by more than 14 days.").

[19] Graves & Peterson, *supra* note 12 at 659.

[20] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, 119 Stat. 3276 (requiring the Secretary of Defense to submit "a report on predatory lending practices directed at members of the Armed Forces and their families.").

[21] U.S. DEPT. OF DEFENSE, REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 4 (2006), http://www.dtic.mil/dtic/tr/fulltext/u2/a521462.pdf.

[22] *Id.*

[23] *Id.*

financial troubles resulted in the revocation of their security clearances.[24] In response to these trends, the Pentagon's study endorsed reestablishing a traditional usury limit of 36 percent on loans to service members and their dependents.[25]

Later that year, Senators Jim Talent of Missouri and Bill Nelson of Florida sponsored an amendment to the Defense Authorization Act for 2007 that would establish a new usury limit on loans to service members and their dependents. After Congress adopted the legislation with overwhelming bipartisan support, President George W. Bush signed the bill into law. [26] Under the statute, a lender may not "impose an annual percentage rate of interest greater than 36 percent" on "consumer credit" offered to military servicemembers and their dependents.[27] In addition to this interest rate cap, the MLA also prohibits creditors from using forced arbitration clauses in consumer credit contracts offered to military personnel and their dependents. This prohibition would guarantee that service members have the right to a day in court regarding consumer credit disputes.[28] In addition, the MLA requires creditors to make mandatory disclosures to servicemembers of any APR charged, as well as disclosures required under the Truth in Lending Act, and to provide a "clear description of the payment obligations of the [service]member or [their] dependent."[29] The MLA also prohibits entirely the extension of certain types of credit to servicemembers, including payday loans,[30] vehicle title loans,[31] and any loan where "the borrower is required to waive [their] right to legal recourse,"[32] or "is prohibited from prepaying the loan or is charged a penalty or fee for prepaying."[33]

Congress divided executive branch responsibility for the MLA between the Department of Defense and other banking regulators and law enforcement agencies. The statute tasked DOD with adopting regulations to implement the statute. Congress also required DOD to periodically consult with the Federal Trade Commission ("FTC"), Board of Governors of the Federal Reserve System ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration ("NCUA"), and the Treasury Department.[34] Knowingly violating the MLA is a federal misdemeanor crime subject to prosecution by the Department

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[24] *Id.* at 45 (citing the fact that "[f]inancial issues account for 80 percent of security clearance revocations and denials for Navy personnel").
[25] *Id.* at 50.
[26] The Military Lending Act, which was part of the John Warner National Defense Authorization Act for Fiscal Year 2007, passed the U.S. House of Representatives 398 to 23. OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPS., FINAL VOTE RESULTS FOR ROLL CALL 510 (2006), http://clerk.house.gov/evs/2006/roll510.xml.
[27] 10 U.S.C. § 987(a)–(b) (2016).
[28] *Id.* § 987(e)(3).
[29] *Id.* § 987(c)(1).
[30] *Id.* § 987(e)(1) (prohibiting the extension of any credit in which "the creditor rolls over, renews, repays, refinances, or consolidates any consumer credit extended to the borrower, by the same creditor with the proceeds of other credit extended to the same covered member or a dependent"); 10 U.S.C. § 987(e)(5) (prohibiting the extension of any credit where "the creditor uses a check or other method of access to a deposit, savings, or other financial account maintained by the borrower").
[31] 10 U.S.C. § 987(e)(5).
[32] *Id.* § 987(e)(2).
[33] *Id.* § 987(e)(7).
[34] 10 U.S.C. § 987(h)(3).

of Justice.[35] Loans made in violation of the act are void from their inception[36] and subject the lender to civil liability for actual damages of no less the $500 for each violation,[37] appropriate punitive damages,[38] equitable or declaratory relief,[39] and costs.[40]

The CFPB's Military Lending Act Responsibilities

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in response to the 2008 financial crisis. Among a variety of reforms, Title Ten of the Dodd-Frank Act, called the Consumer Financial Protection Act of 2010 ("CFPA"), established a new federal agency designed to focus on consumer protection in financial services.[41] Congress recognized that the OCC, FDIC, and NCUA, in addition to their consumer protection responsibilities, all have the important responsibility of maintaining the solvency of banks and credit unions. The Federal Reserve shares this responsibility and is also tasked with conducting monetary policy as well as operating critical financial infrastructure such as the Automated Clearing House system and the FedWire wire transfer system. And although the FTC is focused on consumer law enforcement, it also has antitrust law responsibilities (along with the Department of Justice) and enforces other unfair competition practices in non-financial markets. The CFPB is the one federal agency exclusively focused on consumer financial protection.

In the CFPA, Congress gave the CFPB jurisdiction over "federal consumer financial law." This phrase encompasses jurisdiction over 18 enumerated consumer protection statutes (such as the Truth in Lending Act and Fair Debt Collection Practices Act),[42] the CFPA itself, including its prohibition of "unfair, deceptive, or abusive acts and practices" in consumer finance, and any regulation the CFPB issues in implementing these statutes.[43] Under the

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[35] *Id.* § 987(f)(1).
[36] *Id.* § 987(f)(3).
[37] *Id.* § 987(f)(5)(A)(i).
[38] *Id.* § 987(f)(5)(A)(ii).
[39] *Id.* § 987(f)(5)(A)(iii).
[40] *Id.* § 987(f)(5)(B).
[41] 12 U.S.C. § 5491(a).
[42] 12 U.S.C. § 5481(a)(12) (transferring the implementation of these 18 enumerated consumer protection statutes away from the Federal Reserve and other agencies and to the CFPB).
[43] *Id.* at § 5481(a)(14). The definition reads:

> The term "Federal consumer financial law" means the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this subchapter, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The term does not include the Federal Trade Commission Act.

12 U.S.C. § 5481(a)(14). In turn, the 18 enumerated consumer laws include:

- The Alternative Mortgage Transaction Parity Act of 1982, Public L. No. 97-320, 96 Stat. 1545 (codified as amended at 12 U.S.C. ch. 39);
- The Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (codified as amended at 15 U.S.C. §§ 1667-1667f);
- The Electronic Fund Transfer Act, Pub. L. No. 90-321, 92 Stat. 3728 (codified as amended at 15 U.S.C. ch. 41, subch. 6);

CFPA, the CFPB's jurisdiction extends to any "covered person" that "engages in offering or providing a consumer financial product or service."[44]

The CFPA tasked the Bureau with enforcing federal consumer financial law through two primary mechanisms. First, the CFPA established within the Bureau an Office of Enforcement charged with enforcing federal consumer financial laws either through administrative enforcement procedures[45] or through the CFPB's authority to litigate in federal court.[46] This enforcement authority extends to all nondepository covered persons as well as any bank or credit union with more than $10 billion in assets.[47] The Bureau's litigation authority is independent from the Department of Justice[48] and authorizes the Bureau to seek a wide variety of equitable and monetary remedies.[49]

Second, the CFPA directed the Bureau to establish a supervision program that is separate from the Bureau's Office of Enforcement. Unlike law enforcement actions,

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- The Equal Credit Opportunity Act, Pub. L. No. 90-321, 88 Stat. 1521 (codified as amended at 15 U.S.C. ch. 41, subch. 4);
- The Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1511 (codified as amended at 15 U.S.C. ch. 41, subch. 1, pt. D);
- The Fair Credit Reporting Act, Pub. L. No. 90-321, 84 Stat. 1128 (codified as amended at 15 U.S.C. ch. 41, subch. 3) (excluding §§ 615(e), 628, 15 U.S.C. §§ 1681m(e), 1681w);
- The Home Owners Protection Act of 1998, Pub. L. No. 105-216, 112 Stat. 897 (codified as amended at 12 U.S.C. ch. 49);
- The Fair Debt Collection Practices Act, Pub. L. No. 90-321, 91 Stat. 874 (codified as amended at 15 U.S.C. ch. 41, subch. 5);
- Federal Deposit Insurance Act § 43(b)-(f), 64 Stat. 873 (codified as amended 12 U.S.C. §§ 1831t(c)–(f));
- Gramm-Leach-Bliley Act, Pub. L. No. 106-102, §§ 502-09, 113 Stat. 1338 (codified as amended at 15 U.S.C. §§ 6802-6809) (excluding § 505 as it applies to § 501(b));
- The Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (codified as amended at 12 U.S.C. ch. 29);
- The Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2190 (codified as amended at to various parts of Truth in Lending Act, particularly 15 U.S.C. §§ 1601-02, §§1639-41);
- The Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. ch. 27);
- The S.A.F.E. Mortgage Licensing Act of 2008, Pub. L. No. 110-289, 122 Stat. 2810 (codified as amended at 12 U.S.C. ch. 51);
- The Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. ch. 41, subch. 1);
- The Truth in Savings Act, Pub. L. No. 102-242, 105 Stat. 2334 (codified as amended at 12 U.S.C. ch. 44);
- Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (codified as amended at 15 U.S.C. § 1638); and
- The Interstate Land Sales Full Disclosure Act, Pub. L. No. 90-448, 82 Stat. 590 (codified as amended at 15 U.S.C. ch. 42).

12 U.S.C. § 5481(a)(12).

[44] 12 U.S.C. § 5481(a)(6)(A).

[45] 12 U.S.C. § 5563(a).

[46] 12 U.S.C. § 5564(a).

[47] 12 U.S.C. §§ 5514(c); 5515(c).

[48] 12 U.S.C. § 5564(b) ("[t]he Bureau may act in its own name and through its own attorneys . . . in any action, suit, or proceeding to which the Bureau is a party.").

[49] 12 U.S.C. § 5565(a)(2).

supervisory examinations are audits designed to assess compliance with the law, obtain information about activities, procedures, and compliance systems, as well as detect and assess risks to consumers and to markets.[50] Whereas law enforcement actions are carried out in open court or a public administrative proceeding, supervisory exams are confidential, though they can lead to an enforcement action when the exam uncovers evidence of a serious violation of the law. The Bureau's supervisory jurisdiction is similar to, but somewhat narrower than, its enforcement jurisdiction. As with enforcement, the Bureau's supervisory jurisdiction covers all large banks and credit unions with total assets over $10 billion. In addition, Congress authorized the Bureau to supervise a list of specific types of nondepository covered persons that includes mortgage originators, mortgage servicers, lenders offering private student loans, and payday lenders.[51] The CFPA also authorizes the Bureau to assert supervisory jurisdiction over other large or especially risky nonbank covered persons by issuing regulations.[52] Under this authority the Bureau has issued "larger participant" rules creating supervisory jurisdiction over large nondepository financial services businesses including consumer reporting agencies, debt collection businesses, student loan servicers, international remittance providers, and automobile finance companies.[53]

Supervisory exams are important because, unlike enforcement actions, they facilitate comprehensive review of a supervised business's activities and management systems.[54] In CFPB exams, examiners generally seek relatively unrestricted review of businesses records, interviews of key employees, and access to management systems.[55] Examinations can help a supervised company to restructure their business practices and change corporate culture to prevent violations of the law before they occur. Moreover, supervisory exams can identify violations of the law that would have otherwise gone unnoticed. Many of the Bureau's most important public enforcement actions arose out of confidential supervisory exams.[56]

Because the Military Lending Act predates the existence of the CFPB, the original MLA did not contemplate enforcement by or consultation with the Bureau. Moreover, the Dodd-Frank Act did not explicitly address the MLA, and the MLA is not listed as one of the 18 enumerated statutes that were transferred to the Bureau from other federal agencies. Nevertheless, in the National Defense Authorization Act for Fiscal Year 2013, Congress amended the MLA itself to give the CFPB enforcement authority over the MLA and to add the Bureau to the list of agencies the DOD must consult in exercising its rulemaking

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[50] CONSUMER FIN. PROTECTION BUREAU, CFPB SUPERVISION AND EXAMINATION PROCESS, 3 (2012), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/032017_cfpb_examination-process-overview_supervision-and-examination-manual.pdf.

[51] 12 U.S.C. § 5514(a)(1).

[52] *Id.*

[53] *See* 12 C.F.R. § 1090.104-.107 (2018).

[54] *See* Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 58 ARIZ. L. REV. 34, 68-71 (2016).

[55] Eric J. Mogilnicki, *Preparing for CFPB Examinations*, 2013 BUS. L. TODAY 1, 1 (2013).

[56] The CFPA also established an Office of Fair Lending that works hand-in-hand with enforcement and supervisory staff to enforce the Equal Credit Opportunity Act. ECOA prohibits discriminating against a list of protected classes of people in the provision of financial services. *See* 15 U.S.C. § 1691.

authority.[57] Specifically, since 2013, the MLA as amended authorizes public enforcement of the MLA by "the agencies specified in section 108 of the Truth in Lending Act ("TILA")."[58] Since the financial crisis, the CFPB has been the regulatory authority implementing TILA, which is one of the CFPA's enumerated statutes.[59] The CFPB is, without question, one of the "enforcing agencies" with respect to the MLA for any person subject to the Bureau's enforcement authority.[60] Since the enactment of Dodd-Frank, the CFPB has become the nation's primary consumer protection agency with regard to consumer finance, and plays an essential role in enforcing the Military Lending Act and every other federal consumer financial protection law.

Soon after the 2013 National Defense Authorization Act amendments to the MLA, the CFPB began assuming its MLA responsibilities. For example, when the Department of Defense published an advanced notice of proposed rulemaking contemplating revisions to the scope of the MLA's implementing regulations in Junes 2013,[61] the CFPB consulted with the Department extensively. Among other activities, the CFPB published a detailed report on strategies some banks and nondepository companies were using to circumvent the DOD's MLA regulations.[62] The CFPB's report identified over fifty thousand military servicemembers that received so-called "Deposit Advance Products" from banks with average effective interest rates of over 300 percent APR.[63] Banks had structured these loans as open-ended lines of credit in order to circumvent the DOD's regulations.[64] By 2015, after extensive consultation with the CFPB and the other federal agencies with MLA authority, the Department of Defense amended its MLA implementing regulations to close these loopholes.[65]

About-Face: The CFPB Decided to Abandon Military Servicemember Protection in its Supervisory Examinations Through an Irregular and Flawed Process

At the beginning of the Trump administration, the CFPB's supervisory authority appeared to be well-settled and uncontroversial. The CFPB has engaged in its MLA enforcement and supervisory work for years "without any significant legal opposition," and

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[57] *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, 126 Stat. 1786. (codified at 10 U.S.C. § 987(h)(3)(E)).
[58] 10 U.S.C. § 987(f)(6).
[59] 15 U.S.C. § 1604(a).
[60] 15 U.S.C. § 1607(a)(6).
[61] *See* Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 78 Fed. Reg. 36134 (June 17, 2013) (to be codified at 32 C.F.R. 232).
[62] CONSUMER FIN. PROTECTION BUREAU, THE EXTENSION OF HIGH-COST CREDIT TO SERVICEMEMBERS AND THEIR FAMILIES 8–10 (2014), https://files.consumerfinance.gov/f/201412_cfpb_the-extension-of-high-cost-credit-to-servicemembers-and-their-families.pdf.
[63] *Id.* at 5–7 ("The deposit advances [the CFPB] analyzed [were] substantially similar in structure and purpose to payday loans").
[64] *Id.*
[65] *See* 32 C.F.R. § 232.12(a).

without lenders themselves "challenging [Bureau oversight] based on the law."[66] The Bureau arrived at its supervisory procedures after a long and detailed interagency process conducted through the auspices of Federal Financial Institutions Examination Council (FFIEC), a council of financial regulators established by Congress to facilitate efficient and uniform supervisory exams.[67] Indeed, no bank, credit union, or other financial business has ever legally challenged the Bureau's authority to include MLA compliance within supervisory exams. And when a supervisory exam uncovered evidence of violations of the MLA by a national payday lending chain, the lender quickly settled without contesting the Bureau's MLA authority. The lender, Cash America International, Inc., agreed to provide $14 million in restitution to the service members and their dependents that had been charged illegal interest rates in excess of 36 percent APR.[68] The Department of Defense has not called on the Bureau to stop including MLA compliance issues within supervisory exams, nor have the other FFIEC financial regulators publicly expressed any reservations with the CFPB exercising its MLA responsibilities within supervisory exams.

Nevertheless, in recent months, reports have surfaced that the CFPB has made an about-face in exercising its MLA responsibilities. In August of 2018 the *New York Times* obtained a copy of an internal CFPB document indicating that Acting Director Mick Mulvaney is directing the agency's professional staff to stop covering Military Lending Act compliance within the Bureau's supervisory exams.[69] Acting Director Mulvaney has concluded that the CFPB "might not have the legal authority to actively go looking for [MLA] violations" because this authority "is not explicitly laid out" in the Military Lending Act itself.[70] According to reports, the decision came about following "a comprehensive review" of the CFPB's activities to assess "whether those activities align with its statutory authority."[71] Acting Director Mulvaney's position is nuanced – he concedes that the Bureau has the authority to bring enforcement actions for MLA violations, but maintains that the Bureau may not include MLA compliance issues within supervisory exams (which the Bureau uses to identify violations that

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[66] Glenn Thrush, *Mulvaney Looks to Weaken Oversight of Military Lending,* N. Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/us/politics/mulvaney-military-lending.html; Evan Weinberger, *Senate Dems Blast CFPB Changes to Military Lending Supervision*, BLOOMBERG BNA (Aug. 16, 2018), https://www.bna.com/senate-dems-blast-n73014481811/.

[67] Congress established the FFIEC on March 10, 1979, in title X of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRIRCA), Public Law 95-630. The CFPB sits on the FFIEC along with the Federal Reserve Board, the OCC, the FDIC, and the NCUA. FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, ANNUAL REPORT at *iii* (2017), https://www.ffiec.gov/PDF/annrpt17.pdf. The FFIEC also includes a state liaison committee made up of representatives from state regulatory agencies that supervise financial institutions. *Id.* at 13.

[68] *In re Cash America International, Inc.*, 2013-CFPB-0008 (Nov. 21, 2013), https://files.consumerfinance.gov/f/2013-cfpb_0008_consent-order.pdf.

[69] *E.g.*, Thrush, *supra* note 66; Chris Arnold, *White House Takes Aim at Financial Protections for Military*, NPR (Aug. 13, 2018, 5:00 AM); Neil Haggerty, *Senate Dems to CFPB's Mulvaney: Don't end military lending exams,* AM. BANKER (Aug. 15, 2018, 6:07 PM), https://www.americanbanker.com/news/reed-warns-cfpbs-mulvaney-on-military-lending-act-exams; Emily Birnbaum, *Trump administration mulls changes to financial protections for military members: report,* HILL (Aug. 13, 2018, 1:04 PM), https://thehill.com/policy/finance/401555-trump-administration-poised-to-roll-back-financial-protections-for-military; Paola Chavez, *NYT: Mulvaney to weaken military oversight,* CNN (Aug. 11, 2018, 12:14 PM), https://www.cnn.com/2018/08/11/politics/mulvaney-military-lending/index.html.

[70] Thrush, *supra* note 66.

[71] Weinberger, *supra* note 66.

can, in turn, lead to law enforcement cases). According to press reports, under the new approach the Bureau contemplates that it may bring enforcement actions against lenders who violate the MLA, but it will identify MLA violations through methods other than supervisory exams. Now, according to sources identified by the *Military Times*, the CFPB plans to "rely on complaints from service members and their families" to identify Military Lending Act violations.[72]

This change in policy implemented by the Trump Administration's political leaders overruled the recommendations and past practices of the CFPB's career professional staff in two different internal CFPB offices with responsibility for the CFPB's MLA work. First, the CFPB's political leadership under the Trump Administration overruled the CFPB's own Assistant Director for Military Servicemember Affairs. Included in the appendix to this report is a May 9, 2018 letter from Col. (ret.) Paul Kantwill, the CFPB's Assistant Director of Service Member Affairs, to the Consumer Federation of America.[73] In this correspondence, Assistant Director Kantwill stated that, "[t]he Bureau expects institutions to ensure servicemembers and other eligible consumers are receiving the consumer protections afforded by the MLA. Accordingly, the Bureau is committed to enforcing the MLA through its *supervisory* and enforcement work…."[74] Assistant Director Kantwill's letter goes on to detail the Bureau's plans to task supervisory examiners with "assessing the quality of the institution's implementation of policies and procedures as well as compliance risk management systems."[75] The letter assured that "going forward, the Bureau plans to conduct MLA reviews in several markets."[76] Thus, the decision to exclude MLA issues from supervisory examinations occurred after May of 2018 and apparently was made over the objection of the highest-ranking Bureau official assigned to focus exclusively on military servicemembers and veterans.

Similarly, the CFPB's political leadership under the Trump Administration overruled career professional staff within the Bureau's Office of Supervision Policy. The Office of Supervision Policy develops supervision strategy and provides subject-matter expertise to the CFPB's examination staff on legal and policy issues. This office has the responsibility of producing the CFPB's Examination Manual which guides Bureau examiners and supervised institutions on expectations in supervisory exams. With respect to the MLA, the Bureau's Office of Supervision Policy has produced detailed examination procedures on how to cover the MLA in supervisory exams. Most explicitly, for over five years the Bureau's examination

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[72] Karen Jowers, *Senators urge consumer protection agency not to 'abandon' duty to protect troops, families,* MILITARY TIMES (Aug. 16, 2018), https://www.militarytimes.com/pay-benefits/2018/08/16/senators-urge-consumer-protection-agency-not-to-abandon-duty-to-protect-troops-families/. *See also*, Thrush *supra*, note 2 ("[i]nstead of conducting examinations . . . the [B]ureau will now rely solely on complaints funneled through its website, hotlines, the military and people who believe they have been victims of abuse.").

[73] Prior to serving at the CFPB, Col. (ret.) Kantwill served as Director in the Office of Legal Policy within the Office of the Under Secretary of Defense for Personnel & Readiness at the Pentagon where he led DOD's team on Military Lending Act regulatory implementation. *See* Consumer Fin. Protection Bureau, Press Release, CFPB Announces Changes to Senior Leadership (January 6, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-changes-to-senior-leadership/.

[74] Letter from Paul Kantwill, Assistant Director of Servicemember Affairs, Bureau of Consumer Financial Protection to the Consumer Federation of America 1 (May 9, 2018) (emphasis added) (included Appendix A *infra*).

[75] *Id.*

[76] *Id.* at 2.

manual for small dollar lenders has stated: "Examiners will review for MLA violations and their related risks to consumers."[77] Despite the CFPB political leadership's publicly announced decision, as of the date of this report the Bureau's own examination manual continues to directly contradict Acting Director Mulvaney's public statements on exam procedures for payday lenders and similar businesses.[78]

Furthermore, the CFPB's political leadership arrived at the decision to exclude MLA issues from supervisory exams in direct contradiction with the outcome of a longstanding interagency process coordinated through the FFIEC to create uniform MLA supervisory procedures. The FFIEC is authorized to make decisions on examination policy for businesses subject to each agency's supervisory jurisdiction. In this respect, the FFIEC is a formal interagency body that prescribes uniform principles, standards, and report forms for conducting supervisory exams.[79] The FFIEC facilitates interagency cooperation and training of examiners at each of the body's member agencies.[80] As recently as 2016, the FFIEC "convened an interagency effort to comprehensively revise the interagency MLA examination procedures to reflect the 2015 DOD regulatory amendments. . . ."[81] This effort included not only CFPB's career, professional staff, but also professional staff from all of the FFIEC member organizations. During this process the CFPB continued to conclude that it had the authority to include MLA compliance issues within supervisory exams. In September of 2016, a task force of the FFIEC member organizations unanimously adopted updated examination procedures that included CFPB MLA examination procedures.[82] Not only the Bureau, but every other FFIEC member apparently concluded that the CFPB has the legal authority to include MLA issues within supervisory exams.

To date, no other federal regulatory agency that sits on the FFIEC has publicly objected to the Bureau's past practice of covering MLA issues in supervisory examinations. Based on this collective understanding, in late 2016 the FFIEC trained over 5,600 examiners on uniform MLA exam procedures that included CFPB MLA examinations.[83] Moreover, in 2016, when the Bureau announced the revisions to its MLA supervisory policies that reflected the DOD's amended 2015 final rule, the widely-anticipated step provoked little coverage by the press and

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[77] Consumer Fin. Protection Bureau, *Examination Procedures: Short-Term Small-Dollar Lending*, in SUPERVISION AND EXAMINATION MANUAL, at 4 (September 2013), https://files.consumerfinance.gov/f/201309_cfpb_payday_manual_revisions.pdf.

[78] *Id.* (last viewed October 10, 2018.)

[79] *About the FFIEC*, FED. FIN. INST. EXAM. COUNCIL (last accessed Aug. 28, 2018), https://www.ffiec.gov/about.htm (explaining that the FFIEC "is a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), and the Consumer Financial Protection Bureau (CFPB)."

[80] FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, ANNUAL REPORT 5 (2017), https://www.ffiec.gov/PDF/annrpt17.pdf.

[81] FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, ANNUAL REPORT 13 (2016), https://www.ffiec.gov/PDF/annrpt16.pdf.

[82] *Id.*

[83] *Id.*

little or no backlash from supervised banks, credit unions, or nondepository lenders.[84] Presumably, if the CFPB does exclude the MLA from its examinations, the FFIEC will need to undergo another interagency consultation process, which would likely include the pointless retraining of thousands of examiners on the respective responsibilities of each agency. The Bureau's strange about-face reflects a process that was contrary to the Congressional declaration of purpose for the FFIEC which directs that "[t]he Council's actions shall be designed to promote consistency in such examination and to insure progressive and vigilant supervision"[85] The decision by the Bureau's political leadership to exclude MLA issues from CFPB exams was an unexplained and bizarre unilateral reversal of the FFIEC's longstanding, careful interagency process.

Ironically, the decision to exclude MLA compliance from supervisory exams also occurred outside the very process established by the CFPB's new political leadership to gather information on potential policy reform. Beginning in January of 2018 Acting Director Mulvaney initiated a "call for evidence" comprised of a dozen Federal Register Requests for Information ("RFIs").[86] The Bureau's press release on the process explained that the series of RFIs were designed to "ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers."[87] The series of RFIs addressed a broad array of topics and asked for public feedback on numerous detailed questions. Four of the RFIs addressed the Bureau's supervisory and enforcement mission including RFIs on the civil investigative demands,[88] administrative adjudications,[89] enforcement processes,[90] and the supervision program.[91] Despite all of these opportunities to solicit feedback on possible changes to Bureau supervisory and enforcement policies, not a single question specifically asked about supervision in the context of the MLA. Had the Bureau asked questions about MLA supervision in its RFI process, members of Congress, other administrative agencies including DOD, FTC, the Federal Reserve, OCC, FDIC, and NCUA, as well as military service member organizations, veterans' rights groups, and consumer organizations could have weighed in on the importance and legality of supervisory exams covering the MLA. Instead, the Bureau's

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[84] Press Release, Consumer Fin. Protection Bureau, CFPB Releases Updated Exam Procedures for Military Lending Act, (Sept. 30, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-updated-exam-procedures-military-lending-act/.

[85] 12 U.S.C. § 3301.

[86] Consumer Fin. Protection Bureau, Call for Evidence (2018), https://www.consumerfinance.gov/policy-compliance/notice-opportunities-comment/archive-closed/call-for-evidence/ (listing the twelve RFIs included within the "call for evidence").

[87] Consumer Fin. Protection Bureau, Press Release, Acting Director Mulvaney Announces Call for Evidence Regarding Consumer Financial Protection Bureau Functions: Seeks Public Input on Ways to Better Fulfill Statutory Obligations (January 17, 2018), https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions/.

[88] Consumer Fin. Protection Bureau, *Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes*, 83 FED. REG. 3686 (January 26, 2018).

[89] Consumer Fin. Protection Bureau, *Request for Information Regarding Bureau Rules of Practice for Adjudication Proceedings*, 83 FED. REG. 5055 (February 5, 2018).

[90] Consumer Fin. Protection Bureau, *Request for Information Regarding Bureau Enforcement Processes*, 83 FED. REG. 5999 (February 12, 2018).

[91] Consumer Fin. Protection Bureau, *Request for Information Regarding the Bureau's Supervision Program*, 83 FED. REG. 7166 (February 20, 2018).

political leadership overruled its own career, professional staff without the benefit of the public comments they could have obtained through the very process they had created for just such feedback.

Furthermore, the CFPB appears to have withheld its plans to change direction on MLA supervision from the Department of Defense, the agency Congress tasked with implementing the MLA.[92] Apart from Congress, DOD is the most important institution for the CFPB's political leadership to consult on any changes to MLA policy. All active duty servicemembers protected by the MLA are employees of the Department of Defense and DOD's Manpower Data Center in Monterey, California operates the MLA database that creditors use as an optional safe harbor to identify whether loan applicants are covered borrowers protected by the law.[93] Nevertheless, correspondence between the Pentagon and Senator Bill Nelson—one of two original sponsors of the MLA itself—shows that the CFPB did not consult the DOD on its plans to refuse to include MLA issues within its exams prior to changing the Bureau's policy. The Pentagon's letter, included within the Appendix to this report, states:

> Although the CFPB's acknowledgment of its intent to suspend MLA supervisory examinations has been documented in the media, the Department has not received any official notification from the CFPB in this regard. Additionally, the Department did not discuss this specific change with the CFPB.[94]

General norms of competent governance suggest that the CFPB's leadership should have carefully coordinated its about-face on MLA supervision with the Pentagon. The DOD needs up-to-date information on MLA policy because it is responsible for implementing the statute. The DOD also provides a financial education curriculum to over two million DOD employees.[95] For example, newly enlisted soldiers receive financial readiness training related to issues addressed by the MLA in connection with their boot camp.[96] And yet, the CFPB's political leadership failed to consult—or indeed to even *notify*—DOD of its change in MLA supervisory policy. This failure demonstrates that the Bureau used a defective and irregular process to exclude MLA issues from its supervisory exams.

In sum, the CFPB reached its decision to exclude MLA compliance from supervisory exams over the objections of its qualified career professional staff, without coordinating its changes through the FFIEC, with no public comment despite an active process to provide public comments on this type of change, and without consulting or even notifying the Department of Defense. America's military servicemembers and their families deserve a more

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[92] 10 U.S.C. § 987(h)(1).

[93] See, e.g., DEFENSE MANPOWER DATA CENTER, MILITARY LENDING ACT (MLA) WEBSITE VERSION 4.4 USERS GUIDE at 3-4 (September 20, 2018).

[94] Letter of Stephanie Barma, Performing the Duties of the Under Secretary of Defense for Personnel and Readiness to Senator Bill Nelson at 1 (September 7, 2018) (included in Appendix B *infra*).

[95] *See, e.g.,* Military One Source, *Are You Financially Fit? How to Make Financial Wellness Happen* (2018), https://www.militaryonesource.mil/-/are-you-financially-fit-how-to-make-financial-wellness-happen.

[96] *See, e.g.,* William Skimmyhorn, *Assessing Financial Education: Evidence From Boot Camp,* working paper (August 28, 2015), https://www.usma.edu/sosh/SiteAssets/SitePages/Faculty/Publications/skimmyhorn-manuscript.pdf (studying the effectiveness of the U.S. Army's Personal Financial Management Course (PFMC) for new enlistees).

careful and reflective process prior to executive decisions that can affect their legal rights and financial wellbeing.

The Consumer Financial Protection Act Authorizes the Bureau to Include Military Lending Act Compliance within Its Supervisory Exams

Despite its currently reported misgivings, the CFPB has the legal authority under the Consumer Financial Protection Act to cover Military Lending Act issues in the Bureau's supervisory exams. If the CFPB were ever challenged in court for including the MLA within an exam, it is likely that the "thoroughness evidence in [the Bureau's] consideration" and the "validity of its reasoning" would persuade a court to adopt the Bureau's interpretation of the CFPA encompassing the MLA within the scope of supervisory exams.[97]

If challenged in court, the CFPB's interpretation of the CFPA allowing the Bureau to include the MLA within its supervisory exams would likely receive "the lesser degree of deference prescribed by *Skidmore v. Swift & Co.*," because this interpretation is confined to the Bureau's internal examination manual.[98] Agency interpretations in internal manuals and enforcement guidelines "lack the force of law" and thus "do not warrant *Chevron*-style deference."[99] Rather, interpretations contained in agency manuals and enforcement guidelines are entitled to deference "only to the extent that those interpretations have the 'power to persuade.'"[100] Accordingly, a court evaluating the CFPB's assertion of supervisory authority over the MLA would likely look to the agency's "'body of experience and informed judgment' for guidance to the extent that its position is persuasive."[101]

Under *Skidmore*, the persuasiveness of an agency's interpretation would "depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade."[102]

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[97] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[98] Bank of N.Y. v. F.D.I.C., 453 F. Supp. 2d 82, 94 (D.D.C. 2006) (citing Wells Fargo Bank, N.A. v. F.D.I.C., 310 F.3d 202, 208 (D.C. Cir. 2002).

[99] Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference."). The familiar two-step framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–843 (1984), where courts determine "whether Congress has directly spoken to the precise question at issue," and the court "must give effect to the unambiguously expressed intent of Congress" or, if "the statute is silent or ambiguous with respect to the specific issues," thus requiring the court to determine "whether the agency's answer is based on a permissible construction of the statute," does not apply to the CFPB's interpretation of its own examination manual. The examination manual lacks the force of law because it was not promulgated via an exercise of the Bureau's rulemaking or adjudicatory authority. *See U.S. v. Mead*, 533 U.S. 218, 226 (2001) ("administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

[100] *Christensen,* 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140).

[101] *Wells Fargo Bank.*, 310 F.3d at 208 (quoting *Skidmore,* 323 U.S. at 140).

[102] *Skidmore,* 323 U.S. at 140.

For example, in *Wells Fargo Bank, N.A. v. F.D.I.C.*, the D.C. Court of Appeals applied *Skidmore* deference when upholding the FDIC's interpretation of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), contained in an opinion letter, determining that FIRREA requirements applicable to banks that acquire savings associations "continue to apply when such banks are in turn acquired by other banks."[103] Noting that the FDIC was "charged with administering [the FIRREA's] highly detailed regulatory scheme," the court looked to the FDIC's experience and judgment in deciding that the agency's interpretation of the FIRREA was the "most reasonable" given the evidence of Congress's intent.[104] Under *Wells Fargo*, Courts would likely defer to the CFPB's experience administering the CFPA's highly detailed regulatory scheme and evaluate the thoroughness of the Bureau's consideration and validity of its reasoning for including the MLA in its exams.

Under this standard of review, the Bureau can make a persuasive and reasonable case that the federal law establishing the CFPB's supervisory authority authorizes including the MLA in its exams. The Bureau's authority to conduct supervisory examinations is set forth in two related sections of the Consumer Financial Protection Act. Section 1024(b)(1) of the CFPA provides the Bureau's authority to supervise nondepository businesses and Section 1025(b)(1) sets out the Bureau's authority to supervise large banks and credit unions.[105] The statutory language in both sections is nearly identical except that section 1025 on bank and credit union supervision includes the additional language indicated below in brackets:

> (1) In General. The Bureau shall [have exclusive authority to] require reports and conduct examinations on a periodic basis of persons described in subsection (a) for purposes of --
>
> > (A) assessing compliance with the requirements of Federal consumer financial law;
> >
> > (B) obtaining information about the activities [subject to such laws] and [the associated] compliance systems or procedures of such persons; and
> >
> > (C) detecting and assessing [associated] risks to consumers and to markets for consumer financial products or services.[106]

Discussed below, each of the three subparagraphs within Sections 1024(b)(1) and 1025(b)(1) provide independent justifications authorizing the Bureau to include MLA within supervisory exams.

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[103] *Wells Fargo Bank*, 310 F.3d at 204.

[104] *Id.* at 208–209. *See also Bank of N.Y.,* 453 F. Supp. 2d at 94–99 (applying *Skidmore* deference to another non-force-of-law FDIC interpretation of the FIRREA and adopting the FDIC's interpretation on the basis of the agency's "consistent and soundly reasoned judgment.").

[105] 12 U.S.C. §§ 5514(b)(1), 5515(b)(1).

[106] *Compare* 12 U.S.C. § 5514(b)(1) *with* 12 U.S.C. § 5515(b)(1).

Assessing Compliance with Federal Consumer Financial Law Necessitates Evaluation of Related Military Lending Act Violations

Subparagraph (b)(1)(A) of Sections 1024 and 1025 provides that the Bureau can conduct examinations for the purpose of "assessing compliance with the requirements of federal consumer financial law."[107] Although the Military Lending Act itself is not defined as a federal consumer financial law, violations of the MLA almost certainly risk triggering derivative or concurrent violations of federal consumer financial laws. Far from a novel occurrence, it is very common for violations of one consumer protection law to trigger or occur concurrently with violations of another related law. For example, the Bureau has often brought enforcement actions alleging that descriptions of credit that violate the Truth in Lending Act concurrently violate the Consumer Financial Protection Act's prohibition of deceptive practices.[108] Similarly, an untruthful representation by a debt collector may violate both the Fair Debt Collection Practices Act and the CFPA's prohibition of unfair, deceptive, and abusive practices ("UDAAP").[109] It is unsurprising that consumer protection violations can arise concurrently because a variety of federal consumer financial laws share underlying policy objectives such as creating expectations of accuracy and truthfulness. In the case of the MLA, a violation of the statute is likely to trigger or occur concurrently with violations of at least four other federal consumer financial laws – the Consumer Financial Protection Act, the Truth in Lending Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act – that are all clearly within the scope of the Bureau's examination authorities.

First, it is impossible for the CFPB to conduct a legally reliable supervisory exam without including the MLA because a lender who violates the MLA will simultaneously violate the Consumer Financial Protection Act. An exam under the CFPA *necessitates* evaluating MLA compliance because violating the MLA will trigger violations of the CFPA's prohibition of deceptive, unfair and abusive (UDAAP). Because the CFPA is itself defined as a "federal consumer financial law," the CFPB has supervisory authority to assess compliance with the CFPA's UDAAP prohibition.[110] In *CFPB v. CashCall*, the federal district court for the Central District of California held that collecting debts rendered void through violation of a state usury limit is a prohibited deceptive practice under a federal consumer financial law.[111] Akin to many

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[107] *Id.*

[108] *See, e.g.,* In re Triton Management Group, Inc., 2018–BCFP–0005, 1 (Jul. 19, 2018), https://files.consumerfinance.gov/f/documents/bcfp_triton-management-group_consent-order_2018-07.pdf; In re RMK Fin. Corp., 2015–CFPB–0007, 1 (Apr. 9, 2015), https://files.consumerfinance.gov/f/201504_cfpb_consent-order_rmk-financial-corporation.pdf.

[109] *See, e.g.,* In re Pressler & Pressler, LLP, et. al., 2016–CFPB–0009, 8–10 (Apr. 25, 2016); Complaint at 9–10, CFPB v. Frederick J. Hanna & Assoc., et. al., No. 1:14–cv–02211–AT (Jul. 14, 2014).

[110] 12 U.S.C. § 5481(a)(14) ("The term 'federal consumer financial law' means the provisions of this title . . . .")

[111] Consumer Financial Protection Bureau v. CashCall, Inc., 2016 WL 4820635, at *9–*10 (C.D. Cal., 2016) ("The Court concludes that the CFPB has established that the Western Sky loans are void or uncollectible under the laws of most of the Subject States. . . . Based on the undisputed facts, the Court concludes that CashCall and Delbert Services engaged in a deceptive practice prohibited by the CFPA. By servicing and collecting on Western Sky loans,

state usury laws, under the MLA, "[a]ny credit agreement, promissory note, or other contract prohibited under this section is void from the inception of such contract."[112] If state usury violations can trigger violations of a federal consumer financial law, surely it is a bridge no further to suggest that violations of the federal usury limit protecting military families can as well. There is no serious question that collection of a void debt—which is to say, collection of money that consumers do not owe—will in almost every instance involve a "representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances."[113] A creditor that characterizes a transaction made in violation of the MLA as a debt a servicemember owes misrepresents the most basic nature of the parties' commercial relationship. Taken to the extreme, holding otherwise could place Bureau examiners in the preposterous position of allowing a noncompliant lender to mislead military borrowers with impunity. Courts would be unlikely to conclude that the plain meaning of the Dodd-Frank Act requires such an absurd reading.[114]

Thus, under subparagraph (b)(1)(A) of both Sections 1024 and 1025 of the CFPA, a Bureau supervisory examination can lawfully assess whether a creditor has committed a violation by collecting a debt rendered void under the MLA. In this view, even if one accepts the strained interpretation that the Bureau cannot assess MLA compliance *per se*, the Bureau could still lawfully assess compliance with the UDAAP prohibition established in a federal consumer financial law that is affected by the MLA's remedial provisions. Similarly, even if one takes the strained view that the Bureau does not have the related authority to order corrective action for MLA violations within a supervisory MOU, there is no reasonable basis for believing that the Bureau could not order corrective action for deceptively, unfairly, or abusively collecting debts rendered void by the MLA. At most, under this theory, the remedial provisions at the disposal of the Bureau's supervisory staff would be limited to those afforded by the CFPA, rather than those of the MLA. But even under this view, if the Bureau's staff believed that the MLA's penalties provided a superior measure of relief or if the lender were unwilling to agree to a voluntary resolution of the exam on those terms, the supervisory staff could simply refer the matter to the Bureau's Office of Enforcement which has explicit and direct MLA enforcement authority including the full array of MLA-specific relief. The result is the same, any credible supervisory examination *necessitates* including the MLA lest examiners fail to identify deceptive, unfair, or abusive collection of debts that military families do not owe as a matter of law.

Second, Bureau examiners could conclude that violations of the MLA trigger related violations of the Truth in Lending Act.[115] TILA requires a variety of disclosures to help consumers compare the cost of credit. If a lender extends credit in violation of the MLA's

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CashCall and Delbert Services created the 'net impression' that the loans were enforceable and that borrowers were obligated to repay the loans in accordance with the terms of their loan agreements.").

[112] 10 U.S.C. § 987(f)(3).

[113] FTC POLICY STATEMENT ON DECEPTION, *Appended to* Cliffdale Associated, Inc. 103 F.T.C. 110, 174 (1984).

[114] *See, e.g.,* Chemical Manufacturers Association v. NRDC, 470 U.S. 116 (1985) (where literalistic reading of statutory language would lead to absurd results, statutory language has no plain meaning).

[115] 15 U.S.C. 1601 *et seq.*

usury limit, then the "credit agreement . . . is void from the inception of such contract."[116] And yet, TILA requires that that the requisite price disclosures accurately characterizing the cost of credit "shall be made before the credit is extended."[117] Because a contract made in violation of the MLA is void from its inception, it is reasonable to conclude that a lender fails to provide accurate TILA disclosures whenever those disclosures do not account for the *void ab initio* status of the transaction.[118] As with other federal consumer financial laws, Bureau examiners cannot meaningfully assess a creditor's TILA compliance in a vacuum. Indeed, enforcement of TILA—an enumerated federal consumer financial law—"would be seriously undercut by an interpretation of the Act which recognized an implied exception for usurious loans."[119] Conducting a successful audit of a lender's TILA compliance *by its nature* requires the ability to determine whether an MLA violation has rendered a lender's TILA disclosures inaccurate.

Third, a third-party debt collector that collects debts rendered void by the MLA is also likely to violate the Fair Debt Collection Practices Act (FDCPA).[120] Under current regulations, the Bureau has supervisory jurisdiction to conduct examinations of larger participants in the debt collection industry if the debt collector's "annual receipts resulting from consumer debt collection are more than $10 million."[121] In assessing a larger debt collector's compliance with the FDCPA, Bureau examiners would naturally determine whether the debt collector has reasonable procedures to prevent "the false representation of the character, amount, or legal status of any debt."[122] Because any extension of credit prohibited under the MLA "is void from [its] inception,"[123] a debt collector actively collecting a debt rendered void by the MLA would almost certainly have falsely represented the legal status of the covered borrower's obligations. Bureau examiners must not be placed in the absurd position of ignoring FDCPA violations committed against military families simply because those violations arose out of a misrepresentation triggered by an MLA violation.

Finally, creditors or debt collectors that inaccurately furnish delinquency information concerning debts rendered void under the MLA may violate the Fair Credit Reporting Act (FCRA).[124] Creditors or debt collectors that furnish information to credit reporting agencies have certain accuracy obligations under the FCRA. In particular, Congress requires that furnishers "shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information in

[116] 10 U.S.C. § 987(f)(3).
[117] 15 U.S.C. § 1638(b)(1).
[118] Courts have long held that TILA applies in full force to loans rendered *void ab initio* because they are illegal on other grounds. *See, e.g.,* Williams v. Public Fin. Corp., 598 F.2d 349, 355 (5th Cir. 1979) (declining to "give special lenient treatment to lenders who violate two laws instead of just one" after lender argued TILA should not apply to a loan rendered *void ab initio* under Georgia law).
[119] *Id.* at 356.
[120] 15 U.S.C. 1692 *et seq.*
[121] 12 C.F.R. § 1090.105(b).
[122] 15 U.S.C. § 1692e(2).
[123] 10 U.S.C. § 987(f)(3).
[124] 15 U.S.C. 1681 *et seq.*

inaccurate."[125] The Bureau's examination procedures sensibly require examiners to assess compliance with this provision.[126] It would presumably violate the FCRA for a creditor or debt collector to knowingly furnish information indicating that a military borrower owed a debt rendered void by the MLA to a credit reporting agency. In order to determine whether a creditor or debt collector is violating this provision of the FCRA, Bureau examiners would need to be free to determine whether the debts in question violate the MLA. Again, the Bureau could reasonably instruct examiners not to assess compliance with the MLA for its own sake, but rather to determine whether FCRA violations have arisen from policies or procedures that do not prevent furnishing of inaccurate credit information because of MLA violations. Either way, a successful audit of a lender or debt collector for FCRA compliance by its very nature requires examiners to cover MLA issues.

In sum, the Bureau's ability to execute its statutory mandate under Sections 1024(b)(1)(A) and 1025(b)(1)(A) of the CFPA by assessing compliance with federal consumer financial laws *necessitates* that it supervise for violations of the Military Lending Act. While the MLA itself is not a federal consumer financial law under the CFPA, violation of the MLA will almost certainly trigger violations of the CFPA's ban on unfair, deceptive, and abusive acts and practices, the Truth in Lending Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act, all of which are part of the CFPA's enumerated federal consumer financial laws. Therefore, a reading of the CFPA that requires Bureau examiners to ignore MLA violations would likely produce the absurd result of allowing lenders to violate these other federal consumer financial laws with respect to military borrowers. A reviewing court would disfavor a reading of the CFPA that "would lead to absurd results" or "thwart the obvious purpose of the statute."[127] Accordingly, the CFPB has a persuasive and reasonable basis for examining for violations of federal consumer financial law triggered by MLA noncompliance.

The CFPB's Supervisory Power to Obtain Information on Activities, Compliance Systems, and Procedures Provides the Legal Authority to Include the Military Lending Act within Examinations

Under subparagraph (b)(1)(B) of both Sections 1024 and 1025 of the CFPA, the Bureau's supervisory staff can require reports and conduct examinations for purposes of "obtaining information about the activities" and "compliance systems or procedures" of supervised businesses. Courts could reasonably conclude that subparagraph (b)(1)(B) establishes an independent basis for supervisory authority because it allows examiners to look for violations of the MLA for the purpose of making referrals to the Office of Enforcement.

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[125] 15 U.S.C. § 1681s-2(a)(1)(A).

[126] Consumer Financial Protection Bureau, *Examination Procedures--Debt Collection*, CFPB SUPERVISION AND EXAMINATION MANUAL, at 20 (August 2018), available at: https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/.

[127] C.I.R. v. Brown, 380 U.S. 563, 571 (1965) (stating the proposition that "[u]nquestionably the courts, in interpreting a statute, have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the state.'") (quoting Helvering v. Hammel, 311 U.S. 504, 510–511 (1941)).

Because the Bureau has enforcement authority under the MLA, the Bureau could reasonably argue that under subparagraph (b)(1)(B) its examiners are "obtaining information about the activities" of the covered person, bank, or credit union for the purpose of determining whether to refer the activities to the Office of Enforcement for an investigation of MLA violations. In this view, the Bureau's supervisory staff can legally obtain information about MLA-related activities, compliance systems, and procedures because they are directly relevant to the Bureau's MLA enforcement authority.

This argument holds with equal weight for both depository and nondepository supervised businesses. With respect to supervision of depository banks and credit unions, in Section 1025(b)(1)(B) the Bureau's examiners are tasked with "obtaining information about the activities subject to such laws …."[128] Presumably "such laws" refers to the federal consumer financial laws referred to in Section 1025(b)(1)(A). One of those federal consumer financial laws is the Consumer Financial Protection Act itself which established the Bureau's Office of Enforcement and its related authorities. The CFPA itself is a federal consumer financial law that, among other things, authorizes the Bureau to conduct investigations, issue civil investigative demands, conduct investigative hearings, litigate in federal court or within an administrative enforcement action, and other similar enforcement functions.[129] In this respect, the Bureau's supervisory office should be free to "obtain information" about MLA violations because those violations relate to "activities subject to" the consumer financial law that established the Bureau's Office of Enforcement.[130] With respect to supervised, nondepository covered persons, the Bureau's supervisory office should be free to "obtain[ ] information" about "compliance systems or procedures" both as they relate to the MLA and to compliance systems and procedures associated with Part E of the CFPA.

This basis for including the MLA within supervisory exams is not dependent upon a concurrent violation of an enumerated statute or the CFPA's UDAAP provision. Rather, under this argument, the authority for including the MLA is simply within subparagraphs (b)(1)(B) of both Sections 1024 and 1025 as a direct consequence of the plain meaning of those sections. It is legally appropriate for examiners to "obtain[ ] information about the activities" of supervised businesses that are subject to the CFPA's sections establishing the CFPB enforcement authorities.[131] Any covered person that violates the MLA is subject to the Bureau's enforcement authorities in Part E because Congress granted CFPB MLA enforcement authority in 10 U.S.C. Section 987(f)(6). This, in turn, establishes supervisory authority for obtaining information on activities related to enforcement within supervisory

[128] *Compare* 12 U.S.C. § 5515(b)(1)("The Bureau shall have exclusive authority to require reports and conduct examinations on a periodic basis of persons described in subsection (a) for purposes of (A) assessing compliance with the requirements of Federal consumer financial laws [and] (B) obtaining information about the activities *subject to such laws* and the associated compliance systems or procedures of such persons") *with* 12 U.S.C. 5514(b)(1)("The Bureau shall require reports and conduct examinations on a periodic basis of persons described in subsection (a)(1) for purposes of (A) assessing compliance with the requirements of Federal consumer financial law [and] (B) obtaining information about the activities and compliance systems or procedures of such person").
[129] *See* 12 U.S.C. §§ 5561-5567.
[130] 12 U.S.C. § 5515(b)(1).
[131] 12 U.S.C. §§ 5515(b)(1)(C), 5515(b)(1)(C).

exams. Although supervisory exams are not mere fact-finding missions for potential enforcement, the law contemplates that in some instances—including the MLA—they can be.

The CFPB's Supervisory Power to Detect and Assess Risks to Consumers and Markets Authorizes the Bureau to Include the Military Lending Act within Examinations

Under subparagraph (b)(1)(C) of both Sections 1024 and 1025 of the CFPA, the Bureau's supervisory staff can require reports and conduct examinations for the purpose of "detecting and assessing" "risks to consumers and to markets" for consumer finance products.[132] In the context of the Military Lending Act, one glaring "risk[ ] to consumers" is that creditors will collect higher interest rates than permitted under federal law from servicemembers and their families. Nothing in the plain language of Sections 1024 and 1025 precludes conducting an exam for the purpose of detecting this type of risk. Indeed, it makes sense that the Bureau would include the risk posed to consumers from MLA noncompliance in its "detecting and assessing" of risks to consumers, since the CFPB's own Office of Enforcement is charged with bringing enforcement actions to remediate and deter the harms associated with those risks.

Furthermore, even placing the Bureau's authority to "detect[ ] and assess[ ]" the risk of MLA violations aside, compliance management systems that permit MLA violations are likely to be statistically correlative of *other* violations of federal consumer financial laws. For example, in detecting and assessing risk to consumers from a financial institution's practices, it is within the Bureau's authority to look for proxy variables that would tend to be correlative of violations of federal consumer financial laws. The process of detecting and assessing risk must "account[ ] for a broad range of factors that predict the likelihood of specific consumer harm."[133] The Bureau's staff could reasonably conclude that a lender who violates the national usury limit on loans to military families may have weak compliance management systems. Such weak compliance management and procedures make a lender more likely to harm consumers by violating federal consumer financial laws including the 18 enumerated statutes, the CFPA itself, or any of the CFPB's regulations. Under this view, a Bureau examination can lawfully identify MLA violations as an instrumental method of detecting and assessing risks to consumers and to markets.

Moreover, the "risk-based supervision program" established in 1024(b)(2) reinforces the view that the CFPB can include detecting and assessing the risks of MLA violations within supervisory exams. In that subparagraph Congress stated:

> (2) Risk-based supervision program—The Bureau shall exercise its authority under paragraph (1) in a manner designed to ensure that such exercise, with

[132] 12 U.S.C. §§ 5514(b)(1)(C), 5515(b)(1)(C).

[133] Consumer Fin. Protection Bureau, Prepared Remarks of CFPB Deputy Director Steve Antonakes at the Exchequer Club (Feb. 18, 2015), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-deputy-director-steven-antonakes-at-the-exchequer-club/.

> respect to persons described in subsection (a)(1), is based on the assessment by the Bureau of the risks posed to consumers in the relevant product markets and geographic markets, and taking into consideration, as applicable--
>
> (A) the asset size of the covered person;
>
> (B) the volume of transactions involving consumer financial products or services in which the covered person engages;
>
> (C) the risks to consumers created by the provision of such consumer financial products or services;
>
> (D) the extent to which such institutions are subject to oversight by State authorities for consumer protection; and
>
> (E) any other factors that the Bureau determines to be relevant to a class of covered persons.[134]

This subparagraph provides at least five mutually reinforcing arguments that support including the risk of MLA violations within Bureau supervisory exams. First, the fact that Congress explicitly directed the Bureau to exercise its supervisory authority through a risk-based program suggests that assessing the risk of MLA violations within exams is consistent with the CFPA's overall statutory framework. Congress could have created a more rigid supervisory framework that reduced the Bureau's work to a formulaic approach limited to checking for compliance with each section or subsection of each federal consumer financial law. Instead, the law contemplates, and indeed explicitly directs, the Bureau's staff to exercise judgement in scheduling and designing exams in a way that will efficiently deploy resources to minimize the risk of illegal activity to the public. The notion that Bureau examiners should wear blinders with respect to special risks faced by military consumers is anathema to this approach. A primary job function of examiners is identifying risks of violations that can be referred to the Bureau's Office of Enforcement where appropriate. Given that Congress clearly tasked the Bureau with enforcing the MLA, it would be exasperatingly inefficient for examiners to ignore the exact MLA violations Congress tasked the Bureau with stopping. While shackling examiners in this way might benefit payday lenders and other businesses collecting interest at rates above 36 percent from servicemembers and their families, it is inconsistent with legislative history suggesting the Bureau was established "to protect consumers from abusive financial services practices."[135]

Second, the fact that the law contemplates designing the Bureau's supervisory program "based on the assessment by the Bureau of risks posed to consumers in the relevant product market" suggest that the Bureau should be able to consider MLA violations in product markets where the MLA is most directly applicable. Specifically, in paragraph (a) of Section 1024, Congress expressly instructed the Bureau to supervise any covered person who "offers or provides to consumers a payday loan"[136] And through the MLA, Congress passed legislation explicitly protecting servicemembers and their families from the interest rates included in virtually all payday loan contracts. Because subparagraph (b)(2) requires the Bureau to

[134] 12 U.S.C. § 5514(b)(2).
[135] S. Rep. 111-176, at 1 (Aug. 30, 2010).
[136] 12 U.S.C. 5514(a)(1)(E).

supervise covered persons who provide payday loans in a way that is conscious of the "risks posed to consumers in [that] relevant product market," it strains credulity to suggest that the Bureau must nonetheless ignore the special risks in the payday lending market posed to military families. Moreover, the fact that the Bureau is the only federal agency with supervisory authority over nondepository payday lenders suggests that Congress did not intend to forbid the Bureau from including MLA compliance within payday lender exams. Otherwise, this stilted caricature of federal law would create an especially protected pocket of anonymity and lawlessness with respect to a class of borrowers who have sacrificed so much for the country and a class of lenders Congress held up for special supervisory scrutiny. Surely Congress did not intend to create a system where national banks, state banks, and federal credit unions are all audited for MLA compliance, but payday lenders are not, even when government employees actively examine those payday lenders on other related topics. In this respect, the Trump administration's approach to MLA supervision of the nondepository payday lending market would ironically treat payday lenders making illegal triple-digit interest rate loans to service members more favorably than any other type of financial institution.

Third, the geographic dimension of a risk-based supervisory program suggests Congress did not intend to forbid MLA compliance. In subparagraph (b)(2) Congress directed the Bureau to exercise its risk-based supervisory authority "based on" the Bureau's assessment "of the risks posed to consumers in the relevant . . . geographic markets."[137] Congress adopted the Military Lending Act itself after careful consideration of geographic evidence suggesting that payday lenders cluster around military bases in order to target servicemembers and their families. For example, in a key Senate Banking Committee hearing, Senator Elizabeth Dole of North Carolina presented evidence that in North Carolina, "the counties with the greatest number of payday lenders . . . are areas with significant military presence."[138] Upon review of the DOD's 2006 report on payday lending to military families, Senator Dole explained that "it is apparent that some unscrupulous payday lenders are clustering around military bases across the nation."[139] Senator Dole's conclusion was based on empirical research conclusively demonstrating that "payday lender location patterns unambiguously show greater concentrations per capita near military populations."[140] A meaningful risk-based supervisory program based on geographic factors would by necessity require consideration of the risks particular to the military families that dominate these locations. The statutory directive to the Bureau to implement a supervisory program that is guided by geographic risk implies that

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[137] 12 U.S.C. 5514(b)(2).

[138] *A Review of the Department of Defense's Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents: Hearing Before the S. Comm. on Banking, Housing, and Urban Aff.,* 109th Cong., 2d Sess., S. Hrg. 109-1081, at 218-397 (Sept. 14, 2006) (Statement of Senator Elizabeth Dole). "The county with the [North Carolina's] highest concentration" of payday lenders "was Wayne County, home of Seymour Johnson Air Force Base. Cumberland County, where Fort Bragg and Pope Air Force Base are located, has the third-highest concentration, and Craven County, the site of the Marine Corps Air Station at Cherry Point, has the fourth." *Id.* "In 2005 . . . in the entire three-mile zone surrounding the perimeter of Bragg and Pope, the ratio was four banks to every five payday lenders." *Id.*

[139] *Id.*

[140] *See* Graves & Peterson, *supra* note 12 at 832 ("conclusively demonstrat[ing] that payday lenders target military personnel" through a survey of "20 states, 1,516 counties, 13,253 ZIP codes, nearly 15,000 payday lenders, and 109 military bases").

Congress intended the Bureau to consider compliance issues that are particularly relevant to military towns.

Fourth, subparagraph (b)(2)(C) provides another independent basis of support for concluding that the Bureau can include the risk to service members from MLA violations in Bureau exams. In deciding how to exercise its authority to require examinations and reports, Congress required the Bureau to take into consideration "the risks to consumers created by the provision of such consumer financial products or services." Payday loans and other forms of credit with interest rates in excess of 36 percent are a consumer financial product or service within the meaning of 12 U.S.C. Section 5481(a)(15),[141] and service members and their families are obviously consumers. It would be odd for Congress to explicitly require the Bureau to "take[ ] into consideration" risks imposed by payday loans to military families, but then somehow preclude identification of legal violations arising out of those within an actual exam. Such a reading is especially strained in light of the fact that Congress prohibited making these loans to servicemembers precisely because it concluded those loans carry special risks for military families and for the nation's military readiness.[142]

Fifth, in subparagraph (b)(2)(E) Congress required the Bureau to exercise its supervisory authority "based on the assessment by the Bureau of the risks posed to consumers . . . taking into consideration" "*any other factor* that *the Bureau determines to be relevant to a class of covered persons*."[143] Accordingly, one factor Congress empowered the CFPB to take into consideration in deciding how to exercise its authority is the application of the Military Lending Act to lenders that extend credit to servicemembers and their families. Congress appears to have granted the Bureau considerable discretion both by empowering it to consider "*any*" factor and by explicitly empowering the CFPB itself to be the institution that determines whether that factor is relevant to the exercise of its supervisory authority. Surely one factor that is relevant to the class of covered persons offering triple digit interest rate loans is the fact that their products are illegal to provide to our men and women in uniform. A Congress intent on closely limiting the scope of the Bureau's supervisory examinations would surely not have used such broad and flexible language in setting the parameters of how to engage in identifying risks to consumers.

Moreover, elsewhere in the CFPA Congress directed Bureau leadership to pay special attention to the needs of military service members and their families. Indeed, Congress explicitly established the Office of Military Service Member Affairs within the Bureau "in order to monitor complaints by service members and their families and responses to those

[141] 12 U.S.C. § 5481(a)(15) ("The term 'financial product or service' means—(1) extending credit and servicing loans . . . .").
[142] *See* S. Hrg. 109-1081, 109th Cong. 218-397 (2006) (Statement of Senator Richard Shelby) ("As long as certain unscrupulous lenders continue to employ predatory practices, our servicemen and women suffer and the toll on our readiness will increase.").
[143] 12 U.S.C. 5514(b)(2)(E) (emphasis added).

complaints by the Bureau . . . ."[144] Because Congress created an office within the Bureau "to serve as a watchdog" for servicemembers, it makes sense that servicemember wellbeing would qualify as a permissible risk factor for the Bureau to consider in exercising its supervisory authority.[145] It strains credulity to suggest that those military servicemember rights under the MLA and monitored by the Office of Servicemember Affairs Congress itself created cannot qualify as a factor the Bureau may consider in administering its risk-based supervision.

The Military Lending Act Itself Directs the CFPB to Include the MLA Within Supervisory Exams

Even if one takes the improbable view that the CFPA itself does not authorize the Bureau to include the MLA within supervisory exams, the plain language of the Military Lending Act still does. The administrative enforcement authorization of the Military Lending Act states in full:

> The provisions of this section (other than paragraph (1) of this subsection) shall be enforced by the agencies specified in section 108 of the Truth in Lending Act (15 U.S.C. 1607) in the manner set forth in that section or under any other applicable authorities available to such agencies by law.[146]

This cross reference within the MLA to the Truth in Lending Act refers to the following passage in federal law:

> (a) Enforcing agencies. Subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5511 et seq.], compliance with the requirements imposed under this subchapter shall be enforced under— …
>
> > (6) subtitle E of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5561 et seq.], by the Bureau, with respect to any person subject to this subchapter.[147]

Subtitle B of the CFPA, codified at 12 U.S.C. §§ 5511 to 5519, establishes the "general powers of the Bureau" and includes sections on the purpose, objectives, and functions of the Bureau; rulemaking authority; review of regulations; and, most relevant for purposes of this discussion, the Bureau's supervisory powers and limitations. Subtitle E of the CFPA, which is codified at 12 U.S.C. §§ 5561 to 5567, establishes the Bureau's enforcement powers. The enforcement

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[144] *See* Dodd-Frank Act, Pub. L. No. 111-203, Section 1013(e)(1). *See also* Consumer Fin. Protection Bureau, Office of Service member Affairs: Charting our Course through the Military Lifecycle 8 (May 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201705_cfpb_OSA_Military-Lifecycle-Report.pdf.
[145] Press Release, Reed: Strengthening Military Lending Act will Offer Better Financial Protections for Those who Protect Our Nation (July 21, 2015), https://www.reed.senate.gov/news/releases/reed-strengthening-military-lending-act-will-offer-better-financial-protections-for-those-who-protect-our-nation ("Senator Reed . . . wrote the law creating the Office of Servicemember Affairs within the Consumer Financial Protection Bureau (CFPB) to serve as a watchdog for military personnel.").
[146] 10 U.S.C. § 987(f)(6).
[147] 15 U.S.C. § 1607(a).

power subtitle includes sections on conducting investigations, adjudication proceedings, the Bureau's independent litigation authority, relief available in enforcement actions, criminal referrals, and employee protections.

The most contextually sensible reading of these provisions suggests that the MLA itself authorizes the Bureau to include MLA issues within its supervisory exams. First, the administrative enforcement provision of the MLA contemplates that the Bureau will enforce the MLA "in the manner set forth" in the administrative enforcement provision within TILA. Of course, the CFPB has always included TILA within the scope of its supervisory exams because TILA is one of the 18 enumerated laws that are included within "federal consumer financial law." If the Bureau does not include MLA issues within its exams, then it is not enforcing the law in the manner set forth in Section 108 of TILA because that section is in turn "subject to" the Bureau's supervisory authorities set out in Subtitle B of the CFPA. The manner in which CFPB is instructed to enforce the MLA is subject to the general supervisory powers of the Bureau. While Congress could have spoken with more precision, the manner in which the CFPB enforces Section 108 of TILA is a process that is subject to and thereby includes supervisory exams.

Furthermore, even disregarding the former argument, the MLA disjunctively instructs the Bureau that it "shall" enforce the MLA under "any other applicable authorities available to such agencies by law."[148] The CFPB could persuasively conclude that one "other applicable authority" available to the Bureau for requiring compliance is its supervisory authority over large depository institutions and supervised covered persons. Use of the word "*any*" with respect to other applicable authorities suggests that Congress intended for the Bureau to use the full breadth of its powers. One might respond that supervision is not an "applicable" authority that is available to the Bureau "under law." But a more sensible reading of this limitation is simply that the Bureau and other agencies are not authorized to disregard other explicit and specific statutory limitations to their jurisdiction. For example, Congress likely did not intend to upset the Bureau's jurisdictional limitations by granting the Bureau enforcement authority over small banks or credit unions with less than $10 billion in assets. Rather, the plainest reading of the phrase "any other applicable authority" is a direction to the Bureau to use its complete set of tools, including supervision, in protecting service members and their families from illegal activity by businesses within CFPB's purview.

Consistent with this view, the Department of Defense has taken a regulatory posture that appears to favor the CFPB including MLA violations within supervisory exams. The DOD, rather than the CFPB, is the regulatory authority charged by Congress with issuing the regulations that implement the MLA.[149] The Department has not squarely addressed whether the CFPB has the authority to include MLA violations in supervisory exams. Nevertheless, the DOD has indirectly suggested that supervised financial institutions should be covered by the MLA's requirements. In response to the Department's September 2014 Notice of Proposed Rulemaking, some banks argued that they should be exempt from the scope of the MLA. For example, one bank asked the department to "craft a specific exclusion for insured depository

[148] 10 U.S.C. § 987(f)(6).
[149] 10 U.S.C. § 987(h)(1).

institutions, . . . because they are highly regulated by their prudential regulators, and already prohibited from engaging in abusive practices."[150] The fact that the Department declined to provide such an exemption suggests that DOD supports supervisory examination for MLA requirements. In the preamble to its 2015 final rule, DOD noted:

> [S]upervision to assess compliance by an insured depository institution or insured credit union with safety-and-soundness principles or requirements (or other applicable laws) could provide meaningful benefits to borrowers that are the object of the protections of the MLA. And supervision by the Bureau of covered persons who extend credit for compliance with requirements of applicable federal consumer financial laws is conducted with a view towards providing meaningful benefits to borrowers.[151]

While this passage was not written in contemplation of the current policy dispute, it does clearly show that the DOD recognizes the benefits of supervisory exams. This also makes the CFPB's failure to consult the DOD before changing its policy on MLA supervision all the more problematic. This passage, in combination with the Department's recent letter to Congress expressing surprise at the CFPB's decision to forego supervising for MLA compliance, suggests that DOD had long ago concluded CFPB has ample authority to include MLA issues within supervisory exams.

In sum, the administrative enforcement provision of the MLA instructs that the CFPB "shall" enforce the MLA "in the same manner" that the CFPB requires compliance with TILA. The CFPB's manner of requiring compliance with TILA is subject to and makes use of the Bureau's supervisory powers. To follow Congressional intent with respect to the MLA, the Bureau should be deploying the same types of tools, including supervision, that it uses to require compliance with TILA. Moreover, to prevent any doubt, Congress also stated that the Bureau "shall" enforce the MLA with "any other applicable authorities available to such agencies" which should include supervisory examination.

Conclusion

Under the Trump Administration, the CFPB's political leadership reversed its prior decision to include Military Lending Act issues within supervisory exams through a flawed and irregular process. In particular, the Bureau's political leadership has weakened protection of military families: over the objections of its qualified career professional staff; without coordinating its changes through the Federal Financial Institutions Examination Council; with no public comment despite an active process to provide public comments on this type of change; and without consulting or even notifying the Department of Defense.

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[150] Department of Defense, *Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule*, 80 FED. REG. 43560, 43568 (July 22, 2015).
[151] *Id.* (citations omitted).

This flawed process produced a substantive policy change on servicemember rights that is at odds with nearly a dozen different passages in federal law that give the CFPB apparent authority to include MLA issues within supervisory exams. The CFPB has the legal authority to include MLA issues within supervisory exams for at least four basic reasons. First, MLA violations render servicemembers' loans void, thereby triggering concurrent violations of the federal consumer financial laws that the CFPB must already cover within its exams. Second, the Bureau may use its supervisory exams for the purpose of "obtaining information" about MLA compliance because it pertains to the compliance systems and procedures subject to the enforcement provisions in Part E of the CFPA. Third, the CFPB can cover MLA issues within its exams "for the purpose of detecting and assessing risks to consumers." Under the Bureau's risk-based supervisory program examiners can take into consideration the MLA because, among other reasons, they are authorized to consider "*any other factor"* that "*the Bureau determines to be relevant to a class of covered persons*." And finally, the MLA itself directs the CFPB to enforce the MLA in the same manner—including supervisory exams—that the Bureau uses to ensure compliance with Truth in Lending Act. Indeed, the MLA orders that the Bureau "*shall*" use "*any* other applicable authorities available," to the Bureau to require MLA compliance.

Given all of this, perhaps the most compelling argument in favor of the view that MLA issues can be included in Bureau supervisory exams comes from the fact that Congress did not forbid it. Had Congress, for some inexplicable, inefficient, and unpatriotic reason, intended for the Bureau to not include MLA violations within supervisory exams, it could have easily done so. Congress could simply have included a provision in the law stating that the Bureau "shall not require reports or conduct examinations with respect to section 987 of title 10." Together with the strong affirmative statutory language detailed in this report, the fact that no such a provision, nor anything like it, can be found anywhere in federal law should give the Bureau confidence that it has the discretion to protect our military servicemembers and their families through its supervisory powers.

Appendix A.

May 9, 2018

Michelle Styczynski, Research Advocate
Consumer Federation of America
1620 I Street, NW – Suite 200
Washington, DC 20006

Dear Ms. Styczynski,

Thank you for your letter of December 14, 2017 regarding the Military Lending Act (MLA) and its implementing regulation.[1] You have requested information regarding the Bureau of Consumer Financial Protection's commitment to enforcing the MLA and protecting military families from illegal conduct.

The Bureau expects institutions to ensure servicemembers and other eligible consumers are receiving the consumer protections afforded by the MLA. Accordingly, the Bureau is committed to enforcing the MLA through its supervisory and enforcement work, and, through its Office of Servicemembers Affairs, to carrying out its statutory mission to: see that military personnel and their families are educated and empowered to make better-informed consumer decisions; monitor servicemember complaints about consumer financial products and services; and coordinate the efforts of federal and state agencies to improve consumer financial protection measures for military families.[2]

In 2015, the Department of Defense (Department) promulgated amendments to the MLA's implementing regulation. The amended rule expanded the types of credit products that are covered under the protections of the MLA. In 2016, in conjunction with the other members of the Federal Financial Institutions Examinations Council, the Bureau developed and disseminated interagency examination procedures for the amended rule.[3] It also worked with these agencies to conduct information sessions for examiners regarding the MLA, and for lenders regarding the procedures.

The Interagency Exam Procedures include guidelines to examiners with respect to achieving examination objectives of: determining the institution's compliance with the provisions of the Department's MLA rule, as amended; assessing the quality of the institution's implementation policies and procedures as well as compliance risk management systems; determining the reliance that can be placed on the institution's internal controls and compliance monitoring procedures; and determining corrective action when violations of law are identified or when the institution's policies, procedures, or internal controls are deficient.[4]

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[1] 10 USC 987; 32 CFR Part 232.
[2] *See* 12 USC 5493(e) (1).
[3] *See* CFPB Supervision and Examination Manual, Military Lending Act Interagency Examination Procedures – 2015 Amendments, at MLA 1.
[4] *See id.* at Procedures 1.

In particular, the Bureau is reviewing the institutions' implementation plans, including actions taken to update policies, procedures, and processes, train appropriate staff, and handle early implementation challenges. Going forward, the Bureau plans to conduct MLA reviews in several markets.

In 2013, as you note in your letter, the Bureau took public action against a payday lender, Cash America, for extending payday loans to servicemembers or their dependents in violation of the MLA regulations in effect at that time.[5] The Bureau has not yet brought any public enforcement actions under the Department's amended rule. The Bureau is monitoring risks to consumers resulting from MLA violations and will exercise its enforcement authority in appropriate cases.

In addition to its supervision and enforcement work, the Bureau's Office of Servicemember Affairs (OSA) acts as the voice of servicemembers and works with stakeholders within and without the Bureau to continue to monitor MLA issues closely. It monitors complaints and shares reports from the field with Bureau colleagues. Through the work of the OSA, the Bureau coordinates with other organizations, such as the Military Services' Legal Assistance Communities and the Department of Justice, providing a valuable forum for information sharing and coordination.

OSA outreach efforts to military communities provide the Bureau with insight into consumer financial issues affecting servicemembers, and regularly include State and local agencies. These outreach events also inform OSA's educational efforts, allowing OSA to augment the Department's educational program through the provision of timely and relevant resources to assist servicemembers and their families at all stages of their military lifecycle.

Finally, the Bureau also maintains a close working relationship with the Department, consulting regularly with the Department and the other enumerated interagency partners in the MLA and other financial issues affecting military readiness. Bureau staff participates regularly in the Department's MLA working group.

Thank you for your continued interest in the Bureau's work regarding the MLA and on behalf of servicemembers and their families.

Best Regards,

Paul Kantwill
Assistant Director
Office of Servicemember Affairs
Bureau of Consumer Financial Protection

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[5] *See* Consent Order, *In the Matter of Cash America International, Inc.*, 2013-CFPB-0008 (Nov. 20, 2013).

Cc:

The Retired Enlisted Association
National Military Family Association
Air Force Sergeants Association
Chief Warrant & Warrant Officers Association, U.S. Coast Guard
Commissioned Officers Association of the U.S. Public Health Service

Appendix B.

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

SEP - 7 2018

The Honorable Bill Nelson
United States Senate
Washington, DC 20510

Dear Senator Nelson:

Thank you for your letter of August 22, 2018, to Secretary Mattis, concerning the Consumer Financial Protection Bureau's (CFPB) enforcement of the Military Lending Act (MLA). As the Department's regulations implementing the MLA fall under my purview, I am responding on behalf of the Secretary.

Your letter requested that the Department of Defense (DoD) respond to the following questions:

1) Did the CFPB provide the Department prior notice of its plans to suspend MLA supervisory examinations? Did the CFPB seek DoD's input at all with respect to this proposed change? Did the CFPB provide the DoD with any analysis evaluating the impact of reduced supervision on the agency's ability to bring successful enforcement actions? What is the Department's view of the proposed change?

Although the CFPB's acknowledgment of its intent to suspend MLA supervisory examinations has been documented in the media, the Department has not received any official notification from the CFPB in this regard. Additionally, the Department did not discuss this specific change with the CFPB. The Department regularly consults with the prudential regulators regarding enforcement of the MLA, and the CFPB has proven to be a valuable advocate for Service members and their families through its education programs, technical assistance to the Department, and enforcement of consumer protection measures. The Department believes that the full spectrum of tools, including supervisory examinations, contribute to effective industry education about, and compliance with, the MLA.

2) Does the Department believe that suspending MLA examinations will have an adverse impact on readiness?

Congress enacted the MLA after becoming aware of predatory lending practices targeting Service members and the potential readiness impacts of such practices on our forces and families, including exposure of the affected Service member to the potential loss of a security clearance and involuntary separation from service. Service member use of high-cost financial products has declined in past years, which the Department attributes to a combination of increased education about the potential risks of such products and MLA compliance monitoring and enforcement actions. Nevertheless, the Department remains

concerned that predatory lending practices and high-cost credit continue to pose risks to the financial readiness of Service members and families. Absent continued monitoring and enforcement of MLA compliance, the Department and the prudential regulators may be unable to identify or respond timely to trends or early warning signs of harmful practices.

3) If the CFPB goes forward with this change, how will the Department ensure that servicemembers and their families receive all the MLA protections they deserve?

As required by title 10, U.S. Code, section 992, the Department will continue to provide comprehensive financial literacy training to our Service members throughout their military careers. This training includes education about the responsible use of credit, alternatives to high-cost credit products, consumer protections available under law, and how and where to report potential violations of one's consumer rights. In addition, the Department supplements its educational offerings with robust strategic communications efforts—all with a view to reinforcing key military consumer protections and financial literacy learning objectives across the force. Finally, the Department will continue to carry out its responsibilities under the MLA, including regular consultation with other Federal stakeholders.

I hope that you find these responses helpful. Thank you for your continued interest in ensuring the financial well-being of our Service members and their families. A similar response was provided to the other signatories to your letter.

Sincerely,

Stephanie Barna
Performing the Duties of the Under Secretary of
Defense for Personnel and Readiness

2